In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, not yet reported, appears in the appendix hereto as "A. 1-18." The opinion of the District Court, Middle District of Florida, Tampa Division, as "A. 19-27."

JURISDICTION

The Court of Appeals, Fifth Circuit, entered its judgment on February 25, 1976. It denied a timely Petition for Rehearing *en banc* on March 22, 1976, (A. 31) and this Petition for Certiorari was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the failure to question the admissibility of an out-of-court statement, at or before trial, bars a state prisoner from presenting his voluntariness claim in a federal habeas proceeding where such failure constitutes a waiver under state practice.

2. Whether *Jackson v. Denno*, 378 U.S. 368 (1964), mandates a voluntariness hearing where the admissibility of the confession or admission is not challenged.

AUTHORITIES INVOLVED

Florida Rule of Criminal Procedure 3.190(i), 1972 (A. 30).

STATEMENT OF THE CASE

Florida charged John Sykes with murder in the second degree. The jury found him guilty of third degree murder. At trial, certain out-of-court statements made by him were introduced in evidence. His counsel never challenged the admissibility of the statements, either at or before trial. This constituted a waiver under Florida Rule of Criminal Procedure 3.190 (i), 1972 (A. 30). *Blatch v. State*, 216 So.2d 261 (Fla.App. 1968), *Thomas v. State*, 249 So.2d 510 (Fla.App. 1971). Sykes never raised the admissibility of the statements on his appeal in state court.[1]

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1. After filing his habeas petition, Sykes executed a written waiver waiving any contentions that his state trial or appellate counsel was incompetent (A. 28-29).

Subsequently, John Sykes filed a Petition for Writ of Habeas Corpus in the District Court challenging the voluntariness of his statements. Sykes contended he had been too intoxicated to understand his "*Miranda* Rights". The District Court held an evidentiary hearing, but Sykes declined to present any testimony, relying entirely on the state trial record. Florida contended that Sykes had waived the right to present this issue because of his counsel's failure to challenge the admissibility of the statements.

The District Court ruled Sykes was not bound by his counsel's procedural default and entered an interlocutory order giving Florida 90 days within which to conduct a *Jackson v. Denno*, 378 U.S. 368 (1964), voluntariness hearing (A. 25-26). Florida sought permission and was granted

leave to file an interlocutory appeal pursuant to 28 U.S.C. §1292(b) and Rule 5 of the Federal Appellate Rules. The Fifth Circuit affirmed, holding that Sykes' procedural default did not constitute a waiver even though Florida's procedural rule served a "presumably" legitimate state interest and even though Sykes never alleged or presented evidence of any cause excusing the failure to object.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS INVOLVED IN THOUSANDS OF HABEAS CORPUS PETITIONS FILED BY STATE PRISONERS.

This Court and other circuits have recognized that there is a legitimate interest in the promulgation of procedural rules to insure the timely presentation of issues. *Davis v. United States*, 411 U.S.

233 (1973), *Henry v. Mississippi*, 379 U.S. 443 (1965), *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973).

The lower Court recognized that Florida's procedural rule serves a legitimate state interest. It refused, nevertheless, to give effect to the rule. In short, it destroyed the rule. The decision below is erroneous and presents an important question of Federal Constitutional law. It is important that this Court clarify once and for all whether only federal prisoners are bound by procedural rules or whether the respective states are also entitled to insist on the enforcement of their procedural rules.

The issues are recurring. Since *Fay v. Noia*, 372 U.S. 391 (1963), it has remained unclear to what extent and under what circumstances the failure to utilize available state procedures will preclude subsequent

collateral attack.

The decision of the Fifth Circuit in the instant case muddles the water even more.

2. THE DECISION CONFLICTS WITH THE DECISION OF THIS COURT AND OF OTHER COURTS OF APPEAL ON WHETHER A TIMELY OBJECTION AS REQUIRED BY A STATE PROCEDURAL RULE MAY CONSTITUTE A WAIVER OF A CONSTITUTIONAL CLAIM.

As long as a procedural rule serves a legitimate interest, failure to timely raise a constitutional issue, as required by the rule, constitutes a waiver and precludes consideration of the issue in collateral proceedings, except where cause excusing the waiver is shown. *Henry v. Mississippi*, 379 U.S. 443 (1965), *Davis v. United States*, 411 U.S. 233 (1973).

The lower Court refused to recognize this principle and held that even where a

state criminal defendant does not challenge the admissibility of a statement, as required by a state procedural rule, he is not precluded from thereafter collaterally challenging its admissibility in a federal habeas proceeding.

The holding is in direct conflict with that of the Seventh Circuit in *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973). There, in a habeas proceeding filed by a state prisoner, the Court applied a *Davis, supra*, procedural waiver to the admissibility of an in custody statement.

A similar holding by the Ninth Circuit appears in *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1969). In that case a habeas petitioner contended that certain statements made by him were improperly allowed in evidence because he was intoxicated when he made them. The Court held that

trial counsel's failure to object constituted a waiver of the issue.

3. THE DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON WHETHER *Jackson v. Denno*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE VOLUNTARINESS OF THE CONFESSION OR ADMISSION IS NOT CHALLENGED.

In order to justify its erroneous holding that Sykes was not bound by Florida's procedural rule[2] the lower Court compounded the error by holding that *Jackson v. Denno, supra*, mandates a voluntariness hearing even where a confession or admission is not challenged.

Jackson, v. Denno, supra, does not so mandate. The precepts of *Jackson* are satisfied as long as a forum is provided

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2. While at the same time holding that it ". . . presumably . . . serve[s] a legitimate state interest." (A. 13).

whereby a defendant challenging the voluntariness of a confession can have the issue resolved by the Court as a matter of law. Florida provides such a forum through Criminal Procedure Rule 3.190(i) 1972 (A. 30).

That *Jackson* does not so mandate is clear, not only from the opinion itself, but from subsequent decisions of this Court such as *Lego v. Twomey*, 404 U.S. 477 (1972), where in referring to *Jackson* this Court said:

> "in 1964 this Court held that a criminal defendant *who challenges* the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. . . . "
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> [Text at 478, emphasis supplied]

and *Pinto v. Pierce*, 389 U.S. 31 (1967), where this Court also said:

> ". . . a defendant's constitutional rights are violated when his *challenged confession* is introduced without a determination by the trial judge of its voluntariness after an adequate hearing . . . . "

[Text at 32, emphasis supplied]

In support of its decision, the lower court relies on *Sims v. Georgia*, 385 U.S. 538 (1967). But there the confession was specifically challenged and the issue was whether the Georgia courts afforded a fair and reliable procedure for determining its voluntariness - not one of a *sua sponte* obligation on the part of the trail court to determine voluntariness.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant Certiorari and reverse the holding of the Court of

Appeals in and for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 27 day of April, 1976, I served three copies of the Petition for Writ of Certiorari on William F. Casler, Esquire, Counsel for Respondent, 6795 Gulf Boulevard, St. Petersburg, Florida 33706, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

Louie L. WAINWRIGHT, Director,
Division of Corrections,
Petitioner-Appellant,

v.

John SYKES, Respondent-Appellee.

No. 75-1781.

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1976.

State appealed from an interlocutory order of the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., in a habeas corpus case requiring it to conduct an evidentiary hearing to supplement the record and providing, in the alternative, that the Court would determine the issues on the state record as transmitted, if a supplemental evidentiary hearing were not held. The Court of Appeals, Simpson, Circuit Judge, held that if the trial judge had questioned the admissibility of statements made by defendant at the time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might now foreclose him, on petition for

federal habeas relief, from bringing additional or subsequent arguments regarding the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights.

Affirmed.

1. Criminal Law 412.2(5)

Any incriminating statement made by the defendant absent a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

2. Criminal Law 412.2(5)

A defendant might be too drunk to give a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself and, in such a case, out-of-court statements made by him would be inadmissible at trial as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

3. Criminal Law 414

Before an admission or confession may be introduced in evidence against a defendant, it is incumbent on the trial judge to determine the voluntariness of the statements involved, and the defend-

ant's knowing and intelligent waiver of his constitutional rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

4. Constitutional Law 266.1(5)

As a matter of procedural due process, a defendant is entitled to a hearing on the issue of the voluntariness of an admission or confession made by him.

5. Criminal Law 1144.12

Waiver of Miranda rights will not be presumed from a silent record.

6. Criminal Law 671

Burden is on the state to secure a hearing outside the presence of the jury, not on the defendant to demand it, to determine the voluntariness of any statements made by the defendant and proposed to be used as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

7. Habeas Corpus 25.1(8)

If trial judge had questioned the admissibility of statements made by defendant at time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might foreclose him, on petition for federal habeas relief, from bringing additional or subsequent arguments regard-

ing the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

Appeal from the United States District Court for the Middle District of Florida.

Before GEWIN, BELL* and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The respondent below, Wainwright, (appellant, or occasionally, "the State"), appeals from an interlocutory order of the district court in a state habeas corpus case. That order required the state to conduct an evidentiary hearing to supplement the record before the district court, and provided that in the alternative, if such a hearing is not held, the district court will determine the issues on the state record as transmitted. The effect of the order was stayed for 90 days to permit this appeal. At issue is the petitioner-appellee's contention that statements made by him at the time of his state arrest were unconstitutionally

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.

used as evidence against him at trial, because, conceding that he received his *Miranda*[1] warnings as testified by sheriff's deputies, he was drunk at the time of his arrest and the making of the statements used, and thus incapable of a knowing waiver of the underlying constitutional rights involved. The respondent counters that appellee Sykes' failure to object to the introduction in evidence of the out of court statements at or before trial, required by Rule 3.190(i), Fla.R. Crim.Proc. 1972[2], waived his opportunity to challenge the voluntariness of the incriminating statements.

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1. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

2. (i) *Motion to Suppress a Confession or Admissions Illegally Obtained.*

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Appellee was arrested and charged with second degree murder. On June 5, 1972, he was tried before a jury, and convicted of third degree murder, Fla. Stat. 782.04, in a Florida court. The conviction was affirmed on direct appeal. Subsequently, he unsuccessfully sought habeas corpus relief in the state courts. Thereafter he sought habeas corpus relief in the court below. In an unpublished order of January 23, 1975, the district court found that appellee's trial transcript and the state record was too meager a basis for findings as to the voluntariness of the waiver of the *Miranda* rights involved. Consequently, the court ordered that a *Jackson v. Denno* [3] type evidentiary hearing be held in the Florida court to determine the voluntariness of the out of court statements used as evidence against Sykes. The court later modified its order to permit an interlocutory appeal pursuant to Title 28, U.S.C. § 1292(b), and we accepted the appeal.

At issue then are two distinct waiver problems: (1) did Sykes knowingly and voluntarily waive his *Miranda* rights when he made inculpatory statements at the time of his arrest? (2) did appellee, by failing to object to the introduction of the statements into evidence, as provided by procedural State law, waive the right to bring this objection on appeal or in subsequent proceedings? The purpose of the evidentiary hearing the district court ordered is to determine the factual basis of the underlying waiver issue, or sub-

3. 1964, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908.

stantive issue, to determine if Sykes was in fact so drunk he could not understand his *Miranda* rights, and thus could not knowingly waive them.[4] Our inquiry, in determining the propriety of the district court's order, must focus on the second, or procedural, waiver.

I. NATURE OF THE RIGHT

[1,2] Both appellee and the state recognize that any incriminating statement made by a defendant absent a knowing and intelligent waiver by him of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16

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4. The trial transcript shows affirmatively that Sykes was advised of his rights at the jailhouse. The conversation in which Sykes made incriminating statements took place, however, at the scene of the shooting, shortly after the police had arrived. The record is not clear as to whether Sykes was informed of his *Miranda* rights before these initial statements were given. These initial inculpatory statements made by Sykes, while in the custody of the police, were inconsistent with Sykes' self defense theory at trial. The prosecution called sheriff's deputies who testified to Sykes' statements during the case in chief. The testimony of three separate witnesses indicates Sykes had been drinking at the time he made those statements, and raises the possibility that even if Sykes had been read his rights, he might not have been able to comprehend them, and might therefore have been unable to knowingly waive them.

L.Ed.2d 694. The state does not appear to object to the proposition, in the abstract, that a defendant might be too drunk to give such a knowing and intelligent waiver, and that, in such a case, out of court statements made by him would be inadmissible at trial as evidence against him.[5]

The Supreme Court in *Miranda*, in recognition of the importance of the defendant's Fifth and Sixth Amendment rights, stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisite to the admissibility of any statement made by a defendant". 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725. The state asserts that the protections and prerequisites *Miranda* set out as necessary to the introduction of a defendant's out of court statements might themselves be waived by the failure of the defendant to object to their introduction.

[3-6] Before an admission or confession may be introduced into evidence against a defendant, it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelli-

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5. Cf. *United States v. Taylor*, 5 Cir. 1975, 508 F.2d 761, 763: "The evidence must show the defendant was so affected as to make the statement, after appropriate warnings, unreliable or involuntary". [regarding the admissibility of statements made by a defendant while under the influence of drugs].

gent waiver of his constitutional rights. *Johnson v. Zerbst*, 1938, 304 U.S. 458, 88 S.Ct. 1019, 82 L.Ed. 1461. A defendant is entitled to a hearing on the issue of voluntariness as a matter of procedural due process. *Jackson v. Denno*, supra. The rule set out in *Jackson v. Denno* is that "a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given." *Sims v. Georgia*, 1967, 385 U.S. 538, 543-544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598, "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity". *Id.*, 385 U.S. at 544, 87 S.Ct. at 643, 17 L.Ed.2d at 598.[6] Long before *Jackson v. Denno* the Florida practice was to require the trial judge to hold a hearing outside the presence of the jury to determine the voluntariness of any statements by the defendant proposed to be used as evidence against him.[7] The bur-

6. The waiver of *Miranda* rights will not be presumed from a silent record. *Miranda v. Arizona*, 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724, citing *Carnley v. Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70.

7. "While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relieve the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting

den is on the state to secure this prima facie determination of voluntariness, not upon the defendant to demand it. *McDole v. State*, Fla. 1973, 283 So.2d 553; *Reddish v. State*, Fla.1964, 167 So.2d 858; *Young v. State*, Fla.1962, 140 So.2d 97; *Smith v. State*, 3rd Fla.D.C.A.1974, 288 So.2d 522; *Dodd v. State*, 4th Fla.D.C.A. 1970, 232 So.2d 235.

II. WAIVER

Appellee argues that not only did the state fail to carry its burden in showing affirmatively, on the record, that the statements introduced were voluntarily made, but that the waiver principles enunciated in *Fay v. Noia*[8] make it plain that constitutional rights of such

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them. It is a duty which the law imposes upon the court in order that the prisoner's constitutional right to a fair and impartial trial may be protected and preserved, and this right should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by the respective counsel and won or lost according to their skill in playing the game according to the rules." *Stiner v. State*, 1919, 78 Fla. 647, 83 So. 565.

8. "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

fundamental importance as those considered here may only be waived by the defendant himself, deliberately, and not by his attorney without his personal knowledge, or through a procedural forfeit. The state, however, recites to us a

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"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst* — 'an intentional relinquishment or abandonment of a known right or privilege' — furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits —though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the

litany of cases purporting to show that in instances such as this a purely procedural waiver would bind the defendant, notwithstanding the fact that he had no personal knowledge of the rights waived.

The state sees this as a case controlled by *Henry v. Mississippi*, 1965, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408, which held that it is up to the federal courts to determine whether the enforcement of a state procedural rule serves a legitimate interest so as to preclude a state prisoner from raising questions of constitutional right by federal habeas corpus. Florida Rule of Criminal Procedure 3.190(i)[9] is a contemporaneous objection rule analogous to that considered in *Henry*. Their function is the same; "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence." *Henry v. Mississippi*, supra, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. The facts of this case, however, are not such as to require that federal courts, from any principle of comity, refrain from determining the underlying constitutional claim of Sykes.

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question by federal courts on habeas, for waiver affecting federal rights is a federal question." (citations omitted throughout). *Fay v. Noia*, 1963, 372 U.S. 391, 438-439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837, 869.

9. See Note 2, supra.

Henry dealt with the admissibility of a police officer's testimony as to evidence which had been illegally obtained. Counsel for the defendant in that case did not object at trial to the testimony, and therefore did not comply with the state's contemporaneous objection rule. The Court remanded the case to the state court to determine whether the defendant was "to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of illegally seized evidence." *Id.*, 408 U.S. at 446, 85 S.Ct. at 566, 13 L.Ed.2d at 412. The Supreme Court stated that there was no question but "that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.*, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. As already noted, the contemporaneous objection rule considered in *Henry*, and presumably the one at bar, serve a legitimate state interest. The Supreme Court did not find a waiver in *Henry*, but remanded the case to the state courts, because the Court thought a motion for a directed verdict, made at the close of the State's evidence might have vindicated the state's interest in having the rule followed by alerting the trial judge to the objections of the defendant, and therefore the rule might have been reduced to mere form. The court felt this determination, and other evidentiary questions relating to whether or not error in admitting the evidence was subsequently cured, or whether the defense had engaged in a

deliberate by-pass of the Mississippi rule, would be more properly decided in the state courts. As to this later possibility, the Court opined that a deliberate by-pass of the Mississippi procedural rule would constitute a waiver binding on the defendant.

In *Davis v. United States*, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216, the Supreme Court held the failure of a federal defendant to assert, before trial, a claim of unconstitutional racial discrimination in the composition of the grand jury which had indicted him, as provided for by Rule 12(b)(2) of the Federal Rules of Criminal Procedure, constituted a waiver of his rights. The waiver foreclosed habeas corpus consideration of the issues raised. A major tenet of the *Davis* decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition.[10] In *Newman v. Henderson*, 5 Cir. 1974, 496 F.2d 896, we held, in a habeas corpus action brought by a state prisoner to challenge the racial composition of the grand jury which had indicted him, that absent a showing of actual prejudice, the principles of *Davis* would

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10. Rule 12(b)(2), F.R.Crim.P., provides for the waiver of claims to defects in the institution of criminal proceedings if not asserted before trial. The defendant may be relieved of this waiver "for cause shown". In *Shotwell Mfg. Co. v. United States*, 1963, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357, and in *Davis*, supra, the Court indicated actual prejudice would be a factor in "cause shown".

bind the petitioner to a waiver predicated upon state procedural requirements. However in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent.

The state pursues its claim of waiver by citing *Winters v. Cook*, 5 Cir. 1973, 489 F.2d 174 (En Banc). In that case we held that the defendant had waived his right, by his guilty plea to a murder charge, to subsequently challenge by writ of habeas corpus the racial composition of the grand jury that had indicted him. The record of that case indicated Winter's attorney fully considered the possibility of raising constitutional objections on behalf of his client, but rejected this option for tactical reasons in favor of a plea of guilty (which the state was induced to accept by the "pry-bar" effect of the threat of the possible constitutional objection) which avoided the possibility of a death sentence. The court held that despite the fact the defendant had not been consulted with on the waiver of the grand jury issue, he was bound by that waiver. The court held however, as had the Supreme Court in *Henry v. Mississippi*, that some "exceptional" circumstances would preclude the waiver by counsel of certain rights without the defendant's knowledge. We are confident that *Miranda* rights, in a situation such as this, might constitute such "exceptional" circumstances, see Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1111 n. 102 (1970), but refrain from basing our holding on this rationale alone.

In a case somewhat similar, factually, to this one, the Seventh Circuit in *United States ex rel. Allum v. Twomey*, 7 Cir. 1970, 484 F.2d 740, considered the juxtaposition of *Fay v. Noia* and *Davis v. United States* in relation to a state prisoner's assertion that he did not "knowingly and deliberately" waive his rights to object to the admissibility of an in custody statement made by him. The court found that the state defendant should be held to a waiver by his failure to object even though it was not a personal waiver, but one attributable to his attorney. In evaluating the facts it found persuasive in reaching this conclusion, the court found "there was a reasonable tactical basis for counsel's failure to object to the statement." *Id.*, at 745.

The failure to object in this case cannot be dismissed as a trial tactic, and thus a deliberate by-pass. Aside from the state's bare allegation that such was the case, without the suggestion of the slighted tactical benefit, there is nothing here present upon which to speculate that the defense's failure to object to the introduction of Sykes' statement was a strategic decision. We can find no possible advantage which the defense might have gained, or thought they might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190(i).

III. CONCLUSION

The burden is on the state to introduce a proper predicate for the admission of a confession or statement against interest

into evidence. The trial judge, before receiving the admissions or confessions of a defendant must hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made. *Jackson v. Denno*, supra. This is a pre-requisite to the introduction of the evidence; and the opportunity to have such a hearing is a pre-requisite to any assertion of waiver because of the defendant's failure to object.

[7] The state's interest then, if not to be reduced to mere form, in having Florida Criminal Procedure Rule 3.190(i) followed, must be co-extensive with the established burden on the state. If the trial judge had questioned the admissibility of the statements, required the prosecution to show they were admissible, appellee would have been on notice as to the waiver of his rights, and Rule 3.190(i) might now foreclose him from bringing additional or subsequent arguments regarding the admissibility of the statement in question. Because the trial afforded appellee in this case did not conform to procedural requirements, long established, that the trial judge must assure himself of the admissibility of the criminal defendant's statements, we refuse to construe Rule 3.190(i) as foreclosing Sykes' opportunity to challenge the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights.

The actual prejudice to appellee stemming from enforcing a waiver of *Miranda* rights, as well as the total absence of any indication that his failure to object

is attributable to trial tactics, persuade us that the district court should be affirmed. Justice requires it.

The state will have ninety days from the time our mandate issues to conduct an evidentiary hearing to determine whether Sykes was properly apprised of his *Miranda* rights, and understood and knowingly waived those rights at the time he made the incriminating statements used against him. If the state does not initiate a hearing before the expiration of that time, the district court may determine the issues on the record as transmitted.

The order appealed from is in all respects

Affirmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, Petitioner,	)	
vs.	)	No. 73-316-Civ.T.H.
LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, Respondent.	)	

ORDER

On April 25, 1973, Petitioner, a state prisoner, filed with the Clerk his pro se petition for habeas corpus relief pursuant to 28 U.S.C. §2254. In accordance with a General Order of Assignment, the petition was referred to the United States Magistrate for his Report and Recommendation. The Magistrate, on June 26, 1973, authorized the commencement of the action without prepayment of costs or fees; and, on August 14, 1973, he appointed counsel for Petitioner pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Issue was then joined, and counsel presented briefs concerning the legal and factual issues involved. Thereafter, on August 23, 1974, the

Magistrate entered his Report and Recommendation, recommending that an evidentiary hearing be conducted. See, Wingo v. Wedding, ___ U.S. ___, 94 S.Ct. 2842 (1974).

Accordingly, the Court ordered the filing of a pre-evidentiary hearing stipulation, ordered the production of Petitioner in Tampa, and scheduled a pre-evidentiary hearing and evidentiary hearing. Pursuant to stipulation of counsel, the pre-evidentiary hearing was cancelled and the cause came on for evidentiary hearing on January 9, 1975.

While the file in this cause is sketchy at best, counsel for Petitioner summarized the undisputed facts of the case at the January 9 hearing:

In 1972, Petitioner was charged with second degree murder in the Twelfth Judicial Circuit Court, DeSoto County, Florida. Following a jury trial, Petitioner was convicted of third degree murder and was sentenced to a term of ten years incarceration. An appeal ensued, and his conviction was affirmed by the Second District Court of Appeal. Certiorari was denied by the Florida Supreme Court. In addition, a motion to vacate, set aside or correct sentence addressed to the trial court pursuant to Rule 3.850, Fla. R.Crim.P., was denied, as were petitions for writ of habeas corpus filed in the Second District Court of Appeal and the Florida Supreme Court.

Petitioner now presents two claims to this Court. First, Petitioner asserts

that certain statements made by him to sheriff's deputies were improperly admitted at trial since Petitioner was intoxicated at the time he made them and, therefore, was incapable of understanding the Miranda warnings which were supposedly given. Second, Petitioner asserts that improper instructions were given to the trial jury. With respect to these claims, counsel for Petitioner stated at the January 9 hearing that Petitioner would stand on the trial transcript made in state court and the official documents and papers in the court file. He called no witnesses. Likewise, Respondent presented no additional testimony or evidence.

I. MIRANDA CLAIM

Dealing first with the Miranda claim, it is undisputed that counsel for Petitioner made no motion to suppress the statements prior to the trial in state court, made no objection to the introduction of them at trial, and did not assign as error on appeal the fact that the statements had been received in evidence. However, Petitioner did present his argument to the state courts in his post-conviction motions and petitions, and the Court finds that Petitioner has exhausted his state remedies as to this claim as required by 28 U.S.C. § 2254(b).

Respondent argues that Petitioner's failure to raise this issue in the state courts by motion to suppress, objection, or appeal constitutes waiver of his claim,

and he should not be heard to raise it in this Court. The waiver issue has been the subject of much discussion in the authorities, and the law is now fairly settled. In exceptional circumstances, some strategic decisions at trial can preclude an accused from later asserting a constitutional claim on federal habeas corpus. Henry v. Mississippi, 379 U.S. 443, 451-452, 85 S.Ct. 564, 569 (1965); Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849 (1963); Winters v. Cook, 489 F.2d 174, 176-180 (5th Cir. 1973). Other than the bald assertion, however, Respondent has pointed to nothing in the record and has adduced no evidence here that would demonstrate the kind of exceptional circumstance recognized in the authorities as constituting a waiver. Clearly, therefore, it would be error for the Court to give effect to Respondent's contention on this record. See, e.g., Collier v. Estelle, ___ F.2d ___ (5th Cir. 1975) [slip op. P. 2312, No. 74-2474, Jan. 9, 1975]; Bailey v. Alabama, ___ F.2d ___ (5th Cir. 1975) [slip op. p. 2159, No. 74-2104, Jan 6, 1975].

Turning to the merits of Petitioner's claim that he was intoxicated and incapable of understanding the Miranda warnings given him, the authorities are clear that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), requires that certain warnings or cautions be given to a suspect in a custodial situation and that the suspect fully understand the substance of his constitutional rights as explained in those warnings.

Thus, it is said in the fountainhead case itself:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . . . This Court has always set high standards of proof for the waiver of constitutional rights,. . ., and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders."

Miranda v. Arizona, supra, at 475, 86 S.Ct. at 1628 [citations omitted].

Consequently, the issue presently before the Court, as it is in all habeas cases presenting the Miranda issue, is: has the prosecution sustained its "heavy burden" of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and under-

standingly decline to exercise them? Hill v. Whealon, 490 F.2d 629, 630 (6th Cir. 1974); Hughes v. Swenson, 452 F.2d 866, 868 (8th Cir. 1971). Cf. Hamilton v. Smith, 450 F.2d 922, 923 (5th Cir. 1971); Goodwin v. Smith, 439 F.2d 1180, 1182 (5th Cir. 1971). As to that issue, the only evidence before the Court is that developed in the state trial itself, neither party having presented any testimony or evidence at the January 9 hearing.

The transcript of the proceedings and testimony taken before the Hon. John D. Justice, Circuit Judge, at Petitioner's June 5, 1972 trial is markedly void of the facts and information required by this Court to make a determination of the issue now before it.* The witness, Neil Tyree, testified that he remembered hearing someone advise Petitioner of his "constitutional rights" at the scene of the homicide, Transcript at 16 and 23, but he further testified that he did not remember who it was who gave Petitioner his "rights," Transcript at 23. No testimony at all was given by this witness concerning the substance of any warnings given Petitioner or Petitioner's

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* Under no circumstances should this observation be taken as a criticism of the trial judge. He was given no opportunity to pass on the matter. It should also be observed that Petitioner has withdrawn his claim of ineffective assistance of counsel.

ability to understand any such warnings. The witness did testify, however, that Petitioner smelled of alcohol, Transcript at 19 and 24. Another witness, Gus Grethan, a DeSoto County Deputy Sheriff, testified that he and G. H. Skinner, also a Deputy Sheriff, read Petitioner's rights to him from a card later at the jail, Transcript at 35, and that, at the time the officers arrived at the scene of the homicide, Petitioner was sufficiently intoxicated to be arrested for being drunk, Transcript at 39. Again, no testimony at all was given by this witness, or by any other, concerning the substance of any warnings given Petitioner or Petitioner's ability to understand any such warnings. Thus, were it proper for this Court to directly pass upon the sufficiency of the evidence adduced at trial to sustain the prosecution's "heavy burden," the Court would be constrained to hold that the evidence was not sufficient. However, such a determination at this point would be improper.

A review of the state court proceedings at trial, on appeal, and on post-trial collateral attack reveals that at no time has Petitioner received a hearing on the issue of the voluntariness of his statements pursuant to Jackson v. Denno, 378 U.S. 368, 391, 84 S.Ct. 1774, 1778 (1964). Jackson requires such a hearing; and, further, it requires that the hearing be held in the state courts, rather than in federal court on habeas corpus. Jackson v. Denno, supra, at 393, 84 S.Ct. at 1789-1790; Sigler v. Parker, 396 U.S. 482, 484, 90 S.Ct. 667, 669 (1970). Accordingly, this

Court will stay proceedings in this cause for a period of 90 days from the date hereof to allow the state courts a reasonable opportunity to afford Petitioner a hearing on the voluntariness issue. At the expiration of that period of time, the Court will continue to stay this proceeding if a hearing is then pending in state court. If one is not, the Court will then be required to determine whether or not the state carried its burden on the basis of the record as it presently exists.

Before leaving Petitioner's Miranda claim, two additional comments need to be made. First, no distinction can be drawn between the Jackson case, which deals with confessions, and the subsequent Miranda case, which deals with mere statements. For Miranda makes it clear that "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." 384 U.S. at 476, 86 S.Ct. at 1629.

Second, the fact that 28 U.S.C. § 2254(d) places the burden upon Petitioner in this proceeding to show by clear and convincing evidence that the state court's determination was erroneous, does not assist Respondent in these circumstances. By pointing to the transcript of the state trial, Petitioner has succeeded in demonstrating that the merits of the factual dispute were not resolved in a state court hearing and that the material facts were not adequately developed there. Accordingly, the burden has shifted to Respondent. 28 U.S.C. §2254(d)(1) and (3).

II. IMPROPER JURY INSTRUCTIONS

Petitioner's second claim for habeas corpus relief relates to allegedly improper jury instructions given at Petitioner's trial in state court. Specifically, Petitioner attacks the instruction relating to justifiable homicide. The Court has reviewed the instructions given, Transcript at 121, and the applicable state law, § 782.02, Fla. Stat. The Court finds that the instructions given at trial were adequate, and, to the extent they differ in small part from the statute, that difference does not constitute a claim rising to constitutional proportions. Accordingly, Petitioner's request for relief with respect to this claim is hereby DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 22nd day of January, 1975.

/S/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, #003316,

Petitioner,

vs. No. 73-316Civ.T.H.

LOUIS L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondent.

WAIVER

The Petitioner, JOHN SYKES, hereby waives any contention or allegation as regards ineffective assistance of counsel at trial in the Twelfth Judicial Circuit of Florida or on appeal to the Second District Court of Appeals of Florida, pertaining to a Third Degree Murder Conviction for which he is presently confined in Union Correctional Institution at Raiford, Florida.

Dated this 20 day of November, 1973.

/S/ John Sykes

WITNESSES:

/S/ Calvin C. Campbell

/S/ John H. Henninger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Waiver was mailed to Charles Corces, Jr., Assistant Attorney General, 419 Stovall Professional Building, 305 Morgan Street, Tampa, Florida, 33602. 11/28/73

/S/ William F. Casler
WILLIAM F. CASLER
Counsel for Petitioner
502 Florida National Bank
St. Petersburg, Florida

(i) Motion to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

600 Camp Street
New Orleans, La. 70130
Telephone 504-489-5614

EDWARD W. WADSWORTH
Clerk

March 22, 1976

TO ALL COUNSEL OF RECORD

No. 75-1781 - Louie L. Wainwright, Director, Division of Corrections v. John Sykes

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by/S/ Susan M. Gravois
Deputy Clerk

/smg

CC: Mr. Charles Corces, Jr.
Mr. William F. Casler, Sr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1781

D. C. Docket No. CA73-316-T-H

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,

Petitioner-Appellant,

versus

JOHN SYKES,

Respondent-Appellee.

Appeal from the United States District
for the Middle District of Florida

Before GEWIN, BELL* and SIMPSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle

District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 25, 1976

Issued as Mandate:

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.